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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert Bonds, Circuit Court Judge

Case No. 2023CP1003278
Appellate Case No. 2024-000210

Kathy Kennedy — Appellant

v.

Myatt Air Conditioning, LLC
Bernard Myatt III — Respondents

PETITION FOR REHEARING

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LEGAL STANDARD

The Appellant petitions the South Carolina Court of Appeals for a rehearing *En Banc* of the Court's recent unpublished decision in *Kathy Kennedy v. Myatt Air Conditioning, LLC, Bernard Myatt III*, Op. No. 2026-UP-117 (S.C. Ct. App. filed March 11, 2026).

A petition for rehearing should be granted whenever it shows that the Court has "overlooked" or "misapprehended" a point of fact or law Rule 221(a), SCACR; see also *Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, No. No. 2020-000986, 2022 WL 23560664, (S.C. Aug. 17, 2022) (granting petition for rehearing in part*); S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 219, 851 S.E.2d 699, 700 (2020) (granting petition for rehearing).

Appellant's petition for rehearing is based on the Court's decision in *Kathy Kennedy v. Myatt Air Conditioning, LLC, Bernard Myatt III*, the "Argument" provided herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 240, SCACR; and other rules of court.

ARGUMENT

I. FIRST AND FOURTEENTH AMENDMENT VIOLATIONS

The South Carolina Court of Appeals (The Court) failed to consider Appellant's full record and evidence which constitutes a denial of Appellants right to due process. The Court failed to consider any and all of Appellant's record and evidence, such as that relating to experts' initially finding no evidence of Respondent's causation, due diligence, latent defects, gross negligence, Covid 19 delays and/or Corporate Veil Piercing.

The South Carolina Court of Appeals (The Court) performs an essential function in our system of government to uphold the Rule of Law, but this system works only if the Court applies its precedent faithfully and consistently.

As held in M.L.B. v S.L.J., 519 U.S. 102 (1996), due process requires fair and meaningful appellate review. This right, as articulated in California Motor Transp. Co. v. Truckin, Unlimited, 404 U.S. 508 (1972), extends to ensuring that appellate review is meaningful and comprehensive. The South Carolina Constitution and Rule 210(h), SCACR, reinforce this right by requiring that the full record be reviewed on appeal to guarantee that all relevant facts are considered. Recent cases such as Doyle v. Hogan, 1 F.4th 249 (4th Cir. 2021), further emphasize that appellate courts must ensure that all relevant evidence is considered. The failure to do so, as in this case, constitutes a deprivation of due process.

Sections II through VI provide substantive evidence of the South Carolina Court of Appeals failure to consider Appellant's full record and evidence.

II. THE COURT ERRED WHEN IT FAILED TO APPLY DISCOVERY RULE. THE COURT IGNORED APPELLANT'S RECORD AND EVIDENCE. THE COURT FAILED TO FOLLOW THE COURT'S ESTABLISHED CASE LAW.

The Court erred when it determined Appellant "*knew of should have known by January 19, 2020, when she filed a complaint with the South Carolina Department of Labor, Licensing, and Regulation (SCDLLR) that she had a cause of action for negligence or breach of contract;"*

The Court's failure to actually consider Appellant's entire record and evidence prevented the Court from applying the Discovery Rule and prevented the Court from discovering that the Appellant could not have known she had a cause of action when she filed her complaint with the SCDLLR, January 19, 2020 as the Court alleges. Appellant's record contains evidence that (1) the town of James Island Inspectors inspection on or about 2020 determined that there was no

evidence that the work done by Respondent caused any damage and (2) the first investigation conducted by SCDLLR on or about March 2021 found that there was no evidence that the work done by Respondent caused any damage. If the Court would have afforded Appellant due process and actually considered Appellant's full record and evidence, it would have found that prior to the second inspection by SCDLLR on or about May 25, 2021, Appellant did not have a cause of action for negligence because the latent defect had not been discovered and attributed to the work done by Respondent. Appellant filing suit prior to discovery of the latent defect and it being attributed to Respondent's gross negligence would have resulted in Appellant filing a frivolous suit.

The fact that Appellant contacted the Town of James Island and subsequently SCDLLR shows that Appellant acted with reasonable diligence and the statute of limitations should have been tolled until the latent defect was discovered, as the Court did in *GRANITEVILLE COMPANY, INC. v. IH SERVICES, INC*. 447 S.E.2d 226 (1994). The Court in *Graniteville* held,

> "Graniteville could not have known of the alleged breach of contract until the cause of the fire was determined. Section 15-3-530(1), S.C.Code Ann. (Supp.1993), provides a three year statute of limitations for actions upon a contract. The discovery rule is applicable to such actions. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989). Under the discovery rule, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), cert. granted, 287 S.C. 234, 337 S.E.2d 697 (1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986). The exercise of reasonable diligence means "an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right ... has been invaded or that some claim against another party might exist." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981). Graniteville knew it had experienced a loss … It was, however, unable to determine the cause without the employ of an expert. We can find nothing in the record to suggest that Graniteville should have suspected negligence on the part of IH Services prior to determining the cause …. See Garner v. Houck, ___ S.C. ___, 435 S.E.2d 847 (1993) (finding there was sufficient evidence to create a jury question as to when medical malpractice claim was discovered or should have been discovered)."

III. THE COUR ERRED WHEN IT FAILED TO APPLY SC Code § 15-3-670 (2025); LATENT DEFECT. THE COURT COMPLETELY IGNORED APPELANT'S RECORD AND EVIDENCE. THE COURT FAILED TO FOLLOW THE COURT'S ESTABLISHED CASE LAW.

SC Code § 15-3-670 (2025) defines a latent defect as one that is "by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence."

The Court failed to consider Appellant's record and evidence regarding latent defects, which clearly show the construction defect that resulted from Respondent's gross negligence was latent and could not be discovered by reasonable diligence. Appellant's record and evidence show that the experts, the Town of James Island Inspectors and the first SCDLLR inspectors, failed to discover the defect and attribute it to the Respondent, which clearly demonstrates that the defect was indeed latent and undiscoverable by the Appellant by reasonable diligence.

The Court's case law regarding latent defects and summary judgment is well established in Stoneledge at Lake Keowee Owners' Assoc., Inc. v. IMK Dev. Co., LLC, No. 2015-000417, 2018 WL 4905772, at *1 (S.C. Ct. App. Oct. 10, 2018), where the South Carolina Court of Appeals affirms the trial court's decision to deny a request for a directed verdict based on the question of whether or not the circumstances of the case would put a person of common knowledge on notice that a claim against another party existed. The Court in Stoneledge held,

> "Mindful of our standard of review, we find there is some evidence these latent defects could not have been discovered through the exercise of reasonable diligence until 2009 at the earliest. See Mayer, 331 S.C. at 376, 500 S.E.2d at 207 ("When reviewing a motion for directed verdict, this court must consider all evidence in the light most favorable to the nonmoving party, and may only reverse a jury's verdict if the factual findings implicit within it are contrary to the only reasonable inference from the evidence."). These defects were hidden by stone veneers and exterior walls, and many could not be seen without destructive testing."

IV. FAILURE TO APPLY SC Code § 15-3-670 (2025); GROSS NEGLIGENCE. THE COURT COMPLETELY IGNORED APPELANT'S RECORD AND EVIDENCE. THE COURT FAILED TO FOLLOW THE COURT'S ESTABLISHED CASE LAW.

The Court misinterpreted SC Code and Wedgewood Condo. Ass'n v. Centex Homes, 447 S.C. 54, 71, 923 S.E.2d 288, 296 (Ct. App. 2025) (explaining the statute of limitations for construction defects claim). The Court is correct where it states that gross negligence does not toll the statute of limitations; however, the Court's misinterpretation resulted in its failure to recognize that gross negligence bars the statute of limitations as a defense (SC Code § 15-3-670 (2025)). Respondent's gross negligence should have barred his ability to use the statute of limitations as a defense and the Court should have reversed the Circuit Court's decision granting summary judgment.

V. THE COURT ERRED WHEN IT FOUND THAT APPELLANT RAISED THE ISSUE OF WHETHER THE MAGISTRATE ERRED IN DISMISSING BERNARD MYATT, III, AS A PARTY TO THE LAWSUIT, FOR THE FIRST TIME IN HER REPLY BRIEF.

The Court erred in determining that Appellant had waived any right to this issue. The Court failed to consider the Appellant's full record and evidence. If the Court would have actually considered Appellant's entire record and evidence it would have found that the Appellant first raised this issue in her Magistrate Appeal and subsequently at each phase in the process; all of which contained in Appellant's "Record on Appeal".

VI. THE COURT ERRED WHEN IT FOUND THAT THE APPELLANT'S ARGUMENT ON EQUITABLE TOLLING WAS NOT PRESERVED FOR REVIEW BECAUSE THE ISSUE WAS NOT RAISED TO AND RULED UPON BY THE CIRCUIT COURT.

The Court erred in determining that the Appellant had not raised the equitable tolling issue to and was not ruled upon by the Circuit Court. The Court failed to consider the Appellant's full record and evidence. If the court would have actually considered the

Appellant's full record and evidence it would have found that Appellant brought up this issue to the Magistrate Court and the Circuit Court.

In this case, the Respondents did not even raise any preservation issue or challenge to the arguments made on appeal.

Our appellate courts have consistently stated, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). As the Supreme Court explained:

> "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." *Id*. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). Additionally, "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593, 595-96 (2010).

VII. THE COURT ERRED WHEN IT FAILED TO VACATE SUMMARY JUDGMENT AND REMAND THE CASE TO THE TRIAL COURT FOR A WRITEN ORDER IDENTIFYING THE FACTS AND ACCOMPANYING LEGAL ANALYSIS UPON WHICH IT RELIED IN GRANTING THE SUMMARY JUDEMENT MOTION.

The Court failed to follow its established case law. The Circuit Court in Appellant's case as in *Bowen v. Lee Process Systems Co. , 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000)* failed to articulate the reasons for its action on the record or enter a written order outlining its rationale. In keeping with the Court's established case law, it should have vacated summary judgement in Appellant's case as it did in *Bowen*. The South Carolina Court of Appeals held in *Bowen v. Lee Process Systems Co. , 342 S.C. 232, 536 S.E.2d 86* (Ct. App. 2000), that when a trial court fails to articulate the reasons for its actions on the record the summary judgement will be vacated.

> "On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a

written order outlining its rationale, we simply cannot perform our designated function. We therefore hold a trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. Such an order must "include those facts which the circuit court finds relevant, determinative of the issues and undisputed." In doing so, the trial court should "provide clear notice to all parties and the reviewing court as to the rationale applied in granting . summary judgment." We vacate summary judgment on Bowen's claims of gross negligence and remand the case to the trial court for a written order identifying the facts and accompanying legal analysis upon which it relied in granting Defendants' summary judgment motion." See, e.g., Kaufman, 506 S.E.2d at 95 (remanding the case for the fashioning of an order specifying the rationale for denial of summary judgment where the lower court inadequately articulated the bases for its decision)."

CONCLUSION

The Appellant respectfully requests that the Court rehear its decision in this case for the reasons argued herein.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned does hereby certify that service of the **Petition for Rehearing** was made upon counsel of record by email only this the 24th day of March 2026, as follows:

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